IN THE SECOND CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT

STATE OF TENNESSEE,	)	
***ex rel.* Robert E. COOPER, JR.,**	)	
ATTORNEY GENERAL and REPORTER	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 12C4047**
HRC MEDICAL CENTERS, INC.,	)	
A domestic corporation, *formerly known*	)	
***as* HAIR RESTORATION CENTERS OF**	)	
TENNESSEE, INC., *et al.*	)	**JURY DEMAND**
	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Based on the memorandum opinion, filed contemporaneously herewith, Defendant Dan Hale's motion to dismiss pursuant to T.R.C.P. Rule 12 is hereby **DENIED**.

It is so **ORDERED**.

Entered this 25th day of February, 2014.

JUDGE AMANDA MCCLENDON

Copy

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Defendants.	)	

MEMORANDUM OPINION

Currently before this Court is Defendant, Dan Hale's ("Dr. Hale") motion to dismiss pursuant to T.R.C.P. Rule 12, filed on November 4, 2013. The State filed a response in opposition on December 9, 2013.

Procedural Background

The State filed a complaint for temporary and permanent injunction, judicial corporate dissolution and other relief against defendants on October 8, 2012. The State alleges violations of the Tennessee Consumer Protection Act ("TCPA"). The alleged violations include making false and misleading statements in the commercial marketplace, material omissions about the safety, efficacy, benefits, side effects and risks of "bio-identical" hormone replacement therapy ("BHRT"), and purported

claims about the superiority of BHRT over traditional commercial hormone replacement therapy.

In his Motion to Dismiss, Dr. Hale argues that the State's civil law enforcement action should be dismissed because it is subject to, and failed to follow, the procedural requirements of the health care liability statute. Tenn. Code. Ann. §§ 29-26-101 (a)(1). Specifically, Defendant Dan Hale asserts that the State's action is subject to the health care liability statue based on the definition of "health care liability action," the language in § 29-26-101(a)(1) stating "any such civil action or claim is subject to this part," and § 29-26-118, which sets forth the burden of proving inadequacy of consent in a health care liability action. Dr. Hale contends that the plain wording of the Health Care Liability Act is that *any* entity asserting a claim of harm related to the misapplication of medical judgment or discretion will trigger the technical requirements of the act.

Legal Standard

A motion to dismiss tests the legal sufficiency of a claim, not the strength of plaintiff's proof, and a court should construe all facts in factor of the plaintiff, taking the relevant and material allegations as true. *Stein v Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997). The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. *Legett v. Duke Energy Corporation*, 308 S.W.3d 843 at 851 (Tenn. 2010); *Trau-Med of America, Inc. v. Allstate Insurance Company*, 71 S.W.3d 691 at 696 (Tenn. 2002). A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support

of the claim that would entitle the plaintiff to relief." Crews v. Buckman Labs International, Inc., 78 S.W.3d 852 at 857 (Tenn. 2002); *Fuerst v. Methodist Hospital*, 566 S.W.2d 847 at 848 (Tenn. 1978).

The parties disagree over the nature of the action. Defendant Dan Hale argues that the action is one for medical malpractice, while the State argues that it is a civil law enforcement action to protect the integrity of the commercial marketplace under TCPA. The parties' characterization of the nature of the claim is not determinative. Rather, it is the court's role to determine the gravamen of the complaint. *Moore v. Correct Care Solutions, LLC*, 2013 Tenn. App. LEXIS 199 (Tenn. Ct. App. Mar. 25, 2013) (citing *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636 (Tenn. 2003).

Whether the State Can Bring the Action as a "Person" Under the Health Care Liability Act

The parties disagree that the State can bring an action under the Health Care Liability Act. The State maintains that the Health Care Liability Act is a private right of action and that the statute does not contemplate the State bringing such a lawsuit. Dr. Hale argues that the State is certainly arguing the issues as a "person" within the context of both the Tennessee Consumer Protection Act and the Health Care Liability Act.

Dr. Hale maintains there is nothing in the provisions of the Health Care Liability Act that would exempt the State of Tennessee from complying with the specific requirements of the statute in bringing a medical judgment/informed consent case. The defendant points out that Tenn. Code Ann. § 29-26-121(a)(1)

"does not limit the obligation to comply with the pre-suit notice requirements to the specific, individual patient." Additionally, Dr. Hale points out that a person's "authorized agent" may bring a claim on behalf of an injured medical patient.

There is no doubt that the State is a "person" under the TCPA, however, it is less clear whether the Legislature intended to include the State as a "person" or "authorized agent" of a person under the Health Care Liability Act.[1] The Legislature does not seem to have contemplated such a situation in drafting the Health Care Liability Act. As the State points out, the Health Care Liability Act uses the words "person" and "entity" separately in the statute. Tenn. Code Ann. § 29-26-121(c). And there is no precedent for the government bringing a medical malpractice action.

Application of the "Health Care Liability Act" to the Present Action

While the Health Care Liability Act is fairly expansive, not all cases involving health or medical care automatically qualify as medical malpractice claims, see P*ullins v. Fentress Cnty. Gen. Hosp.*, 594 S.W.2d 663, 669 (Tenn. 1979),

It is clear that TCPA claims may be brought against health care providers for entrepreneurial, business, and commercial practices. *Proctor v. Chattanooga Orthopaedic Group, P.C.*, 270 S.W.3d 56, 59 (Tenn. Ct. App. 2008). While physicians are not immune for claims against them under the TCPA, the Court of Appeals has made it clear that medical malpractice claims may not be recast as TCPA claims. *Id.* at 60.

[1] T.C.A. § 47-18-103 (Part Definitions) (13): 'Person' means a natural person, individual, governmental agency, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized:"

As defendant states, where medical judgment and informed consent are the fundamental, predicate issues, the parties must comply with the procedural requirements of the Health Care Liability Act. Defendant goes on to say that the Health Care Liability Act must be followed "if the underlying issue involves medical judgment and discretion, and the claim is that harm *has causally occurred* due to the misapplication of that judgment. Def. Mot. To Dismiss at 6 (emphasis in original).

Defendant maintains that the Tennessee legislature's use of the words "any claim" pertaining to medical care is unconditional and unrestricted. The Tennessee Court of Appeals has not interpreted the Health Care Liability Act to apply *absolutely* to all claims with some relation to medical care. This is clear from the court's opinion in *Proctor.*

The *Proctor* case certainly involved medical care as it was a lawsuit against the doctor who performed plaintiff's surgery. The Court of Appeals found that the gravamen of the plaintiff's complaint sounded in deceptive business practices because the "plaintiffs did not allege that defendants had deviated from the applicable standard of professional practice in either the decision to perform the surgery or the manner in which it was performed." *Id.* at 60. Likewise, the State does not allege that the defendants deviated from the applicable standard of care in administering the treatments in this case.

This case concerns HRC's deceptive marketing materials, including the failure to inform potential customers of possible side effects. At first blush, this sounds like an informed consent case. The statute regarding informed consent provides:

> In a health care liability action, the plaintiff shall prove by evidence as required by § 29-26-115(b) that the defendant did not supply appropriate information to the patient in obtaining informed consent (*to the procedure out of which plaintiff's claim allegedly arose*) in accordance with the recognized standard of acceptable professional practice in the profession and in the specialty, if any, that the defendant practices in the community in which the defendant practices and in similar communities.

Tenn. Code Ann. § 29-26-118 (Supp. 2013) (emphasis added).

According to the Tennessee Supreme Court, "[a] lack of informed consent claim typically occurs when the patient was aware that the procedure was going to be performed but the patient was unaware of the risk associated with the procedure." *Ashe v. Radiation Oncology Assocs., 9 S.W.3d 119 (Tenn. 1999)* (quoting *Blanchard v. Kellum*, 975 S.W.2d 522, 524 (Tenn. 1998)). 'The inquiry focuses on whether the doctor provided any or adequate information to allow a patient to formulate an intelligent and informed decision *when authorizing or consenting to a procedure." Shadrick v. Coker*, M.D., 963 S.W.2d 726 (Tenn. 1998) (emphasis added). "A cause of action based on the lack of informed consent stems from the premise that a competent patient should be allowed to formulate an intelligent, informed decision about surgical or other treatment procedures the patient undertakes. *Housh v. Morris*, 818 S.W.2d 39, 41 (Tenn. App. 1991)."

The defendant argues that the State has "attempted to couch [its] argument in the more general terms of 'misrepresentation'" However, it's the defendant that is trying to cast the complaint as something that it is not. The defendant argues that the complaint is one for medical malpractice lying in failure to provided informed consent.

The State has not alleged lack of informed consent related to a specific procedure and no allegation of injury to a specific patient.[2] As recognized by the court in *White v. Beeks*, "risks which [do] not materialize are legally without consequence." (citing *Bryant v. Bauguss*).

The *Beeks* court, as many other courts have, cited the D.C. Circuit Court of Appeals seminal informed consent decision, *Canterbury v. Spence*, 464 F.2d 772, 150 U.S. App. D.C. 263 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064, 93 S. Ct. 560, 34 L. Ed. 2d 518 (1972). In *Canterbury*, the Court discussed the requirements of a claim based on lack of informed consent, stating:

> No more than breach of any other legal duty does nonfulfillment of the physician's obligation to disclose alone establish liability to the patient. *An unrevealed risk that should have been made known must materialize, for otherwise the omission, however unpardonable, is legally without consequence.* Occurrence of the risk must be harmful to the patient, for negligence unrelated to injury is nonactionable. *And,* as in malpractice actions generally, there must be a causal relationship between the physician's failure to adequately divulge and damage to the patient.
>
> A causal connection exists when, but only when, disclosure of significant risks incidental to treatment would have resulted in a decision against it.

64 F.2d at 790 (emphasis added).

The defendant asserts that the statute "certainly [] would include the claims against Dr. Hale that he failed to provide proper informed consent." This might be

[2] In its Complaint, the State does put for the fact that at least three female consumers of HRC Medical's BHRT have been diagnosed with breast cancer during or after taking BHRT. The State maintains it does not intend to show a causal connection between the diagnoses and BHRT treatments administered by HRC, rather it intends to show that such incidents are wholly inconsistent with defendants' statements asserting no cancer risks and cancer protection of BHRT.

true if there was injury alleged to a particular plaintiff or if the complaint referenced a specific procedure to which informed consent applied. The State's claims exist independent from any injury or even any treatment.

The 2011 amendments did reaffirm the broad, inclusive definition of a "Health Care liability action" as "any civil action, including claims against the State, alleging that a Health Care provider or providers have *caused injury related to the provision of or the failure to provide Health Care services*, regardless of the theory of liability on which the action is based." (emphasis added).

Defendant relies heavily on *Estate of Martha S. French v. Stratford*, a case in which a claim was pursued on behalf of a "claimant" under the provisions of the Tennessee Adult Protection Act ("TAPA"), Tenn. Code Ann. § 71-6-101, et seq. 333 S.W.3d 546 (Tenn. 2011). It was claimed that the Plaintiff was harmed due to a violation of the TAPA, in the context of a medical setting, and that the TAPA provided a separate cause of action. The Tennessee Supreme Court rejected this argument,

The *French* court noted that the TAPA statute "cannot be used to provide an additional right of recovery for medical malpractice claims" when it affirmed that any cause of action arising within the scope of the statute must be presented through, and governed solely, by the Tennessee Medical Malpractice Act ("TMMA"). *Id.* at 564 (citing *Cannon v. McKendree Vill., Inc.*, 295 S.W.3d 278,284 (Tenn. Ct. App. 2008) *and Conley v. Life Care Ctrs. of Am., Inc.*, 236 S.W.3d 713,726 (Tenn. Ct. App. 2007).

The defendant argues that the State "may not skip past the underlying medical judgment/informed consent predicate requirements." But what the defendant neglects to address is the failure of the plaintiff to plead any injury which would form the basis of a medical malpractice claim. In *French*, the death of a nursing home resident was the subject of the complaint. *Id.* at 551. Regardless of whether the case proceeded under the TMMA or TAPA, the actions of nursing home staff led to an injury, which was clearly pled by the plaintiff.

The State's claims in this case primarily relate to HRC's actions before any procedures were performed. HRC did not even draw blood from its customers until after a contract had been signed. The gravamen of the State's complaint lies in actions HRC took to bring customers to the clinic and sign contracts to undergo treatment. It is possible that there are individuals who did suffer injuries as a result of the medical judgment and discretion exercised by defendants, however, that is not what is alleged by the State in this case.

The Complaint is based on the advertising, marketing and promoting of BHRT, claims that can exist wholly independently of any treatment actually being rendered.

This court finds that the gravamen of the State's complaint lies in in alleged deceptive business practices under the Tennessee Consumer Protection Act, not in medical malpractice. The State's law enforcement action does not meet the definition of "Health Care liability action" found in Tenn. Code Ann. § 29-26-101(a)(1).

For the foregoing reasons, Dr. Hale's motion to dismiss is respectfully **DENIED.**

Dr. Hale alternatively requested an interlocutory appeal pursuant to T.R.A.P. Rule 9. The request for interlocutory appeal is **GRANTED** and will be addressed in a separate order. The court directs the State to prepare the order granting the interlocutory appeal.

It is so **ORDERED.**

Entered this 25th day of February, 2014.

JUDGE AMANDA MCCLENDON

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